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FILE: [REDACTED]
SRC 06 001 51799

Office: TEXAS SERVICE CENTER Date: APR 05 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation operating as an importer of handicrafts, leather goods, and garments and as an exporter of textile testing materials. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director concluded that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, the petitioner disputes the director's findings and submits a brief in support his arguments.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The primary issue in this proceeding is whether the petitioner would employ the beneficiary in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization; or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted a letter dated September 29, 2005 in which the following responsibilities were used to describe the beneficiary's proposed position:

- Direct and coordinate marketing and business development activities of the organization[.]
- Formulate and administer company policies[.]
- In consultation with the management and the parent company in India, develop long-range goals and objectives of the company[.]
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary[.]

- Oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses[.]
- Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives[.]
- Oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters[.]
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives[.]
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company[.]

The petitioner also provided a copy of its organizational chart and payroll records. Nevertheless, the director determined that additional information was needed prior to making a final determination regarding the petitioner's eligibility.

Accordingly, on October 29, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, in part, a list of the beneficiary's proposed day-to-day duties accompanied by a percentage of time to be spent performing each duty listed. The petitioner was also asked to provide brief job descriptions of the beneficiary's subordinates, if any. If no subordinates are to be managed, the petitioner was asked to discuss the essential function she would manage within the petitioner's organization.

In response, the petitioner resubmitted its organizational chart illustrating three levels of personnel with the beneficiary listed at the top level. The four subordinate positions listed under the beneficiary all carry managerial titles. Of those four managers, three are shown with subordinates of their own. It is noted that while the customer service manager carries a managerial title, she is not shown as having any subordinates. According to the submitted payroll records and W-2 statements, the customer service manager appears to be employed on a part-time basis, working on average three hours or less per day. Similarly, the subordinates of each of the three managerial employees also appear to be part-time employees working 17 hours or less per week. With regard to the requested list of job duties, the petitioner provided the following:

- Contract negotiations with clients. (Time spent 10%)[.]
- Direct and coordinate marketing and business development activities of the organization by overseeing the maintenance of the company [w]ebsite, e-commerce business, marketing research, advertising and promotions. (Time spent 20%)[.]
- Formulate and administer company policies by establishing the high-level goals[.] (Time spent 5%)[.]

- In consultation with the management and the parent company in India, develop long-range goals and objectives of the company, particularly that of [q]uality [c]ontrol, budget forecasting and work flow management[.] (Time spent 5%)[.]
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary[.] (Time spent 5%)[.]
- Oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses, including the [s]upervising and controlling of the work of other supervisory, professional and managerial employees[.] (Time spent 35%)[.]
- Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives[.] (Time spent 5%).
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives[.] (Time spent 5%).
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company[.] (Time spent 5%).

In addition, the petitioner provided information about the remainder of its staff, including job titles, brief job descriptions, and their respective levels of education. Additional payroll records and employee W-2 statements were also provided.

On June 13, 2006, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director referred to the description of duties provided in response to the RFE, noting that her proposed duties include "business marketing, staff recruitment and supervision, and other duties comprising the daily productive tasks of the company." While the AAO concurs with the director's conclusion regarding the petitioner's eligibility, her comments regarding the beneficiary's job duties are inaccurate and are not reflected in the record. More specifically, the above list repeats, verbatim, the entire list of the beneficiary's proposed duties and responsibilities none of which state that the beneficiary would perform the petitioner's marketing tasks. While such a conclusion may be reached by inference based on an assessment of the petitioner's personnel structure and its failure to explicitly state who performs its marketing, the petitioner made no statements affirmatively stating that the beneficiary would perform the marketing-related tasks.

The director also suggested that staff recruitment and staff supervision are non-qualifying tasks. Such reasoning is flawed, as it does not take into account all relevant factors. Namely, the petitioner's list of tasks and responsibilities does not allot a specific amount of time to staff recruitment. Rather, in illustrating the beneficiary's level of discretion, the petitioner states that the beneficiary has hiring and firing authority. Concluding that the beneficiary spends a significant amount of time on staff recruitment based on the information provided by the petitioner is erroneous. Furthermore, the director's conclusion that staff supervision is a non-qualifying task is not accompanied by the necessary analysis of whether the beneficiary's subordinate staff is comprised of managerial, supervisory, or professional employees. Staff supervision in itself is not a non-qualifying task. Section 101(a)(44)(A)(ii) of the Act specifically provides for managerial

capacity employees who supervise the work of "other supervisory, professional, or managerial employees." Thus, only by determining that the beneficiary supervises non-supervisory, non-professional, or non-managerial employees would the director be justified in concluding that the beneficiary's supervisory duties are non-qualifying. In the present matter, the record suggests that three out of four of the beneficiary's subordinates are managerial employees. Thus, an adverse conclusion cannot be based on the beneficiary's supervisory duties.

Rather, in examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). In the present matter, the breakdown provided by the petitioner in response to the RFE is primarily comprised of broad job responsibilities which are general and do not convey an understanding of the beneficiary's daily tasks. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). According to the breakdown, a total of 20% of the beneficiary's time would be spent on various planning and establishment of goals. However, this broad range of responsibilities does not elaborate on actual duties that would be performed on a daily basis for at least 20% of the beneficiary's time. The petitioner also stated that 20% of the beneficiary's time would include overseeing the petitioner's website and e-commerce business. However, the petitioner did not elaborate either on its website or e-commerce business when discussing the beneficiary's employment or the employment of other personnel within the organization. As such, her actual duties with respect to these aspects of the business are entirely unclear.

Furthermore, while the petitioner claimed that 5% of the beneficiary's time would include overseeing the purchasing and marketing departments, neither of those departments were included in the organizational chart; nor were purchasing and marketing duties attributed to the job descriptions of other members of the petitioner's staff. This is not the only inconsistency on record. Specifically, the petitioner indicated that 35% of the beneficiary's time would be spent supervising the work of other supervisory, professional, and managerial employees. However, in a separate statement on appeal, the petitioner claims that "the [b]eneficiary has managed the essential function of [p]residency," which focuses on the management of a function rather than the management of personnel. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5) The petitioner's suggestion that presidency is a specific function is incorrect. The position of president is an executive position within the petitioner's organization and cannot be defined as a function necessary to the petitioner's operation. Thus, the petitioner's statements on appeal suggest an inadequate understanding of the term "function manager" and in general contradict earlier statements which suggest that a significant portion of the beneficiary's job would include employee supervision. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, with regard to assertions that staffing size is not a dispositive factor in determining a petitioner's eligibility, the petitioner's argument is irrelevant, as staffing size was not the basis of the director's denial and is not a determining factor in the AAO's current decision. Regardless, staffing can and should be considered in order to determine whether the petitioner is physically capable of relieving the beneficiary from having to

perform the non-qualifying tasks necessary for the petitioner's daily operation. That being said, the petitioner failed to provide adequate evidence to support the staffing structure claimed. In Part 5, item 2 of the Form I-140, which was filed on September 30, 2005, the petitioner claimed five full-time employees and ten contractors and part-time employees. However, the petitioner provided only four W-2 statements to account for four full-time employees. There is no documentation for a fifth full-time employee and no documentation for any part-time employees or independent contractors. It is noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, even if an organization provides evidence showing a sizable support staff, approval of the Form I-140 is not automatic. The petitioner must nevertheless provide a detailed description of the beneficiary's daily tasks. In the present matter, the petitioner has not provided an adequate description of the beneficiary's duties. As previously discussed, the description provided in response to the RFE lacks an account of the beneficiary's proposed day-to-day duties and instead is replete with generalities and inconsistencies, which undermine the petitioner's overall claim that the beneficiary would primarily perform qualifying duties within a managerial or executive capacity. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the information provided, the AAO cannot conclude that the beneficiary would primarily perform qualifying tasks. For this reason, the petition may not be approved.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(A) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to filing the Form I-140. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during her employment abroad as well as a percentage breakdown attributed to each of the beneficiary's past duties. While the petitioner complied, in part, by providing a list of duties and responsibilities, it failed to attribute a percentage of time allotted to each item on the list. This information is relevant and necessary, as the petitioner's list includes such tasks as contract negotiations, organizing trade shows, marketing research, and advertising. In light of the fact that these tasks are non-qualifying, the petitioner must establish that the beneficiary did not spend the primary portion of her time performing them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The lack of a percentage breakdown precludes the AAO from concluding that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In response to the RFE, counsel stated that the same individual, Mahendra Kumar Bansal, owns 60% of the U.S. petitioner and the beneficiary's foreign employer. However, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362; *Matter of Hughes*, 18 I&N Dec.

289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. While the documentation provided in response to the RFE may establish common ownership, it does not resolve the issue of control. The fact that Mr. Bansal assumes 60% of the foreign entity's profits and losses does not establish that he controls the foreign partnership entity. In fact, the Deed of Partnership is silent as to the issue of control. Since the petitioner has not submitted sufficient documentation to establish that the two entities are controlled Mr. Bansal, common ownership and control have not been established.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility as discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.